Hartford Hospital *and* New England Health Care Employees Union, District 1199, AFL–CIO. Case 34–CA–6785

July 31, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND TRUESDALE

The issue in this case[1] is whether the judge correctly found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the exclusive representative of a unit of technical employees in a psychiatric hospital, after that hospital merged with and became a wholly owned subsidiary of the Respondent. The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Hartford Hospital, Hartford, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] On May 5, 1995, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a brief in reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] In the remedy section of his decision, the judge mistakenly ordered that any backpay owing be computed in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). The correct formula is as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971).

Craig Cohen, Esq., for the General Counsel.
Brian Clemow, Esq., *Scott D. Macdonald, Esq.*, and *Raymond M. Bernstein, Esq.*, of Hartford, Connecticut, for the Respondent.
John M. Creane, Esq. and *Michael E. Passero, Esq.*, of Milford, Connecticut, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. New England Health Care Employees Union, District 1199, AFL–CIO (the Union) filed a charge on October 24, 1994, and an amended charge on November 21, 1994, alleging that Hartford Hospital (Respondent) is engaging in unfair labor practices. On December 8, the Regional Director for Region 34 issued a complaint and notice of hearing wherein Respondent is alleged to have engaged in activity in violation of Section 8(a)(1) and (5) of the National Labor Relations Act: (1) by refusing to recognize and bargain with the Union as the representative of a unit of employees formerly employed by a psychiatric hospital, the Institute of Living (IOL), after a merger of the Respondent and IOL on October 1, 1994; and, (2) unilaterally instituting changes in those employees' wages and working conditions without affording the Union notice and the opportunity to bargain.

A hearing was held in this matter on March 13 and 14, 1995. Briefs and reply briefs were received from the parties on April 14, 1995. By letter dated April 19, 1995, Respondent objected to the General Counsel's reply brief, contending it asserted a new theory that the General Counsel had disavowed at hearing. For his part, the General Counsel filed a motion shortly thereafter seeking to strike the letter. The motion to strike is granted for the reasons asserted in the motion.

Pending before Chief Judge Peter C. Dorsey, United States District Court for the District of Connecticut, is a petition dated December 29, 1994, filed pursuant to Section 10(j) of the Act, which alleges the same violations of the Act as involved here. On March 30, 1995, Chief Judge Dorsey granted the Regional Director's petition for preliminary injunction pending final resolution of this matter by the Board by directing Respondent to: (a) recognize and bargain, exclusively and in good faith, with the Union about terms and conditions of its members' employment; (b) bargain about any union request for restoration of terms and conditions of employment prevailing at IOL before the merger; (c) post and maintain copies of the district court's order where other employee notices are posted, pending the Board's proceedings and any appeals thereof, and allow the Union to monitor compliance.

Based on the entire record in this proceeding, including the demeanor of the witnesses, and after consideration of the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Hartford Hospital, a nonprofit Connecticut corporation with offices and a place of business in Hartford, Connecticut, has been engaged in the operation of an acute care hospital. The Institute of Living, a nonprofit Connecticut corporation with offices and a place of business in Hartford, Connecticut, has been engaged in the operation of a psychiatric hospital. It is admitted, and I find, that at all material times, Respondent and IOL have each been employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and each have been health care institutions within the meaning of Section 2(14) of the Act.

II. THE INVOLVED LABOR ORGANIZATION

It is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues Presented for Determination*

A brief recitation of background facts will make the issues in this case clear. On March 5, 1981, the Union was certified as the exclusive collective-bargaining representative of a unit of employees of IOL. From about March 5, 1981, until about

September 30, 1994, the Union was recognized by the IOL as the exclusive collective-bargaining representative of the unit employees, and such recognition was embodied in successive collective-bargaining agreements, the most recent of which was effective from June 15, 1992, to June 14, 1994. The IOL and Hartford Hospital merged on October 1, 1994, with the IOL becoming a wholly owned subsidiary of Respondent. The complaint alleges that following the merger, IOL has continued to exist in basically unchanged form. Alternatively, the complaint alleges that about October 1, Respondent assumed the business of IOL at the IOL facility and since that date has continued to operate the business of IOL in basically unchanged form and has employed as a majority of its employees at the IOL facility individuals who were previously employees of IOL.

The complaint further alleges that Respondent has continued as the employing entity and is a successor of IOL at the IOL facility and that at all time since October 1, 1994, the Union has been the exclusive collective-bargaining representative of Respondent's employees in the unit. About September 29, 1994, the Union, by letter, requested that Respondent recognize it as the exclusive collective-bargaining representative of the unit and bargain collectively with it over the wages, terms, and conditions of employment of the unit employees. Since about October 1, 1994, Respondent has failed and refused to recognize and bargain with the Union. Since about October 1, 1994, Respondent has made numerous changes in the terms and conditions of employment of employees in the unit, including but not limited to, increasing wages, changing the method for computing paid time off, and implementing different pension and health plans. Respondent made such unilateral changes without affording the Union an opportunity to bargain over them. By its conduct, the Respondent is alleged to have violated Section 8(a)(1) and (5) of the Act.

The Respondent asserts it has no obligation to recognize and bargain with the Union primarily because it contends that since the merger the former IOL bargaining unit is no longer a legally appropriate one. It contends that the only appropriate unit would be a far larger one, encompassing all Hartford Hospital employees falling within the job classifications set out in the unit description, or a hospitalwide unit falling within one of the eight acute care health facility unit descriptions contained in the Board's Rules and Regulations.

For the reasons that are detailed below, I ultimately agree with the position urged by the Union and the General Counsel. Though both sides to this dispute find substantial support for their positions in existing case law, only the position asserted by the General Counsel will give effect to the public policies of the Act. If that position is accepted, the 14-year-old bargaining unit, which is maintained virtually intact after the merger, will continue to have the Union's representation. Because this unit is effectively segregated from the Hospital's other employees, there is no evidence that any labor dispute that might occur between the unit and the Hospital will spread to other of the Hospital's employees. There is likewise so little contact between the unit employees and the other hospital employees that differences in wages and working conditions that might result from collective bargaining should not prove to be a source of employee unrest. On the other hand, to deny the continuation of representation to the former IOL bargaining unit clearly might lead to unrest among its members and result in labor turmoil. I believe it is of utmost importance to keep the policies and purposes of the Act in mind when viewing this case lest one may become lost in the legal minutiae cast out by the parties.

B. *Background Facts About the Involved Entities*

The IOL, prior to October 1994, was a private psychiatric hospital, with its main campus located on 34 acres of land bordering Washington Street and Retreat Avenue in Hartford, Connecticut. On this property are located several connected and unconnected buildings, including locked psychiatric units, as well as some open space and forested areas. IOL also operated four residential group homes known as ''transitional living facilities,'' two of which are located on the main campus, and two of which are located in the surrounding community, one two blocks south of the campus and one on the north side of Retreat Avenue, immediately adjacent to the main Hartford Hospital campus. Both prior to October 1994 and after, IOL provided a wide variety of in-patient and out-patient psychiatric services from its main campus and its outlying facilities. Since March 5, 1981, based on a Board certification, the Union has represented the employees of IOL at both its main campus and outlying facilities in the following unit:

> All full-time and regular part-time technical employees, including LPN's, psychiatric technicians, residential counselors, rehabilitation liaison instructors, rehabilitation instructors, COTA's, EEG technicians, X-Ray technicians, and dental technicians employed at the IOL facility, but excluding unit coordinators, rehabilitation coordinators, electronics technician, audio-visual technician, dietary technician, all service and maintenance employees, clerical employees and guards, professional employees and supervisors as defined in the Act.

At the time of certification the unit consisted of approximately 250 employees employed in the various classifications noted in the unit description. Through attrition and layoffs that have occurred over the past 14 years, as of March 1995 there are approximately 85–90 former bargaining unit employees who remain employed at the IOL. Within that group there are approximately 27 residential counselors, 55 psychiatric technicians, 1 X-ray technician, 1 EEG technician, and 2 rehabilitation liaison instructors. Notwithstanding the job classifications certified by the Board and enumerated in the collective-bargaining agreement, there were no other employees employed by IOL in any other bargaining unit classifications except as noted above. The most recent collective-bargaining agreement between the Union and IOL was effective from June 15, 1992, to June 14, 1994. Former bargaining unit employees work in four in-patient psychiatric units located in the Donnelly building on the IOL campus, as well as in the on-campus and off-campus transitional living facilities. In its last full fiscal year prior to its acquisition, the IOL's budget was approximately $32 million and it had approximately 525 full-time employees. The IOL had about 427 licensed beds, of which just 110 were staffed.

Hartford Hospital is a large acute care facility with approximately 950 beds, of which about 650 were staffed and fully operational. It is located on about 22 acres in downtown Hartford, across the street from one side of the IOL

main campus. Its campus consists of several buildings and an unconnected parking lot. The Hospital offers a wide variety of patient services at its facility, including in-patient psychiatric services in an unlocked unit with approximately 40 beds. Prior to October 1994, this unit was located in the Conklin building on the Hartford Hospital main campus and was commonly referred to as CB-2. In addition to its in-patient psychiatric service, Hartford Hospital offered a small day treatment program, a psychiatric emergency room, and a ''consultation liaison service,'' which provides an interface between general medicine and psychiatry for patients with both mental health and medical problems.

In its last full fiscal year prior to the acquisition of the IOL, the Hospital's budget was approximately $380 million and it had approximately 4700 full-time employees.

C. *The Events Leading to the Merger*

For several years immediately preceding its combination with the Hospital, the IOL had been hurt by payor-driven changes in the mental health field. The constraints placed by insurance companies on the utilization of mental health services resulted in dramatic decreases both in the number of patients at the IOL and in the average length of their stays. As a consequence, from 1990 to 1993, IOL's inpatient days declined from approximately 120,000 to 40,000. Cost-cutting efforts, while helpful, did not address the more fundamental trends in the medical marketplace afflicting the IOL. Thus, despite eight reductions-in-force since 1989 that had brought its complement of full-time employees from 1050 to 525, the IOL operated at a loss every fiscal year since 1989. In its last full fiscal year as an independent enterprise, the IOL lost over a million dollars.

In order to avoid a continuation of this trend, the IOL began a strategic planning process in 1992 that sought to determine its long-term viability as an independent, stand-alone psychiatric hospital. The conclusion reached by the IOL's management was that the IOL would not long survive without becoming part of a larger, regional system of care that included primary medicine in addition to psychiatry and, more importantly, that involved the IOL's joining forces with a larger, financially more stable organization. Ultimately, the IOL identified Hartford Hospital, with which it had long enjoyed a collaborative relationship, as the ideal strategic partner.

Hartford Hospital also saw advantages in combining with the IOL. It had an interest in the preservation of another important hospital and nonprofit institution in the Hartford area. (Tr. 215.) Hartford Hospital's department of psychiatry also was ill-equipped to compete on its own in the emerging managed care marketplace. It lacked the full range of mental health programs and services that the IOL offered, as well as the comprehensive network of outside providers and numerous managed care contracts that the IOL enjoyed. In the Hospital's judgment, it would not be likely to succeed in any effort to develop these capabilities on its own in the current marketplace.

With these goals in mind, the IOL and Hartford Hospital executed on July 9, 1993, a document entitled ''A Vision for Collaboration & Memorandum of Understanding'' (the MOU). Under the heading ''Program Overview,'' the MOU states that ''[t]he core of this proposal is to create a single, fully integrated mental health system of care under the auspices of the IOL, under the overall umbrella of Hartford Hospital. . . . While services would remain at both campuses as appropriate, they would be governed, managed, and led as a single service.'' Under the heading ''Organizational Intent,'' the MOU states the following:

> It is the unequivocal intent of both organizations that the identity, mission, and special focus of the Institute of Living will be maintained and enhanced under a new IOL.
>
> All mental health programs on both campuses should be integrated into a single new entity—the new IOL.
>
> The new IOL requires and results from total integration of current Hartford and IOL programs plus new ones, to create a mental health system of care which is stronger and better than each predecessor entity could achieve individually. Change would occur very quickly as programs are integrated.
>
> Corporately, the new IOL will become a wholly-owned subsidiary of Hartford Hospital. The Hartford Hospital Governing Board will be the sole member and will have ultimate authority and responsibility for the new IOL.
>
> The HH Board of Directors will delegate to the new IOL governing body substantial advocacy, advisory and operational monitoring responsibility in continuing and expanding IOL's mission, tradition, and identity. In particular, the new IOL governing body will be responsible for the development of a new multidisciplinary neuropsychiatric program and other strategic initiatives in psychiatry.
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> The new IOL's governing body will consist of no more than 15 members, each of whom will also be a member of the HH Board of Directors. The present IOL Board of Directors will remain in place in an advisory capacity for up to three years following the new IOL's start-up, to allow for continuity and an orderly transition.
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> Of the initial IOL governing body's membership, a majority of members will be from among present IOL Board members who will also be elected to the Hartford Hospital Board of Directors. Of these, at least two will also be elected to the Hartford Executive Committee.
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> The remaining additional members (one of whom will be the Hartford Hospital CEO) of the initial IOL governing body will be drawn from among present Hartford Hospital Directors.
>
> The initial IOL governing body members will be divided into three classes with one, two and three year terms. Vacancies, and all seats after the third year, will be filled for one-year terms.
>
> The new corporate organization, including governance through the IOL Executive Committee, will be effective immediately when this plan is implemented (April 1, 1994).
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> As soon as practicable following approval of a binding Letter of Intent, three IOL Directors will be elected to the HH Board of Directors, two of whom will be appointed to the HH Executive Committee. These three Directors will be included in the initial IOL governing body members described above.

> The IOL President will provide day-to-day executive leadership, management direction, and governing body interaction and will report to the Hartford Hospital CEO.
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> The new IOL will have a single medical staff resulting from the integration of the staffs at HH and the present IOL. As the Department of Psychiatry for Hartford Hospital, the new IOL medical staff and the Department Chair/Psychiatrist-in-Chief will be fully incorporated into the medical staff organization and structure of Hartford Hospital.
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> The status of existing IOL subsidiary corporations will be assessed and specified within the Letter of Intent. Both organizations recognize the importance of the IOL National Board of Governors and will continue to seek its advice and counsel.
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> Embodying these philosophical commitments—a single new program as well as a strong IOL governing board—is achieved by interweaving two strong strands together. As to governance, the new IOL's governing body, nominated by common HH/IOL Nominating Committee and all of whom will be Hartford Hospital Directors, will have a specific focus on the mission, tradition, and performance of the new IOL. The HH Board of Directors will delegate substantial responsibilities to this Executive Committee. At the same time, a seamless program will result from oversight by Hartford Hospital's Board and the direct reporting relationship of the IOL president to the Hartford Hospital CEO.

By letter of the same date as the MOU, the Union was notified of the contemplated merger. By letter dated July 15, 1993, The Union's vice president in charge of the hospital division, Paul Fortier, requested a meeting with representatives of the IOL to discuss the possible impact of the merger on the employees represented by the Union. Representatives of the IOL and the Union met on September 16, 1993, at which time the Union was told that the contemplated merger would not affect the relationship that the IOL had with the Union. As noted above, the existing collective-bargaining agreement between the parties was due to expire on June 14, 1994. The original target date for the merger was April 14, 1994.

On November 3, 1993, the Hartford Hospital and the IOL entered into a legally binding letter of intent to formalize the procedures to achieve the desired merger. Although Respondent seems to argue on brief that the letter of intent was significantly different than the MOU, it does not appear so to me. In fact it appears to track the significant portions of the MOU set forth above. In fact, the agenda for the IOL board of directors meeting held November 2, 1993, reiterates the goals and vision of the MOU and contemplates IOL becoming a wholly owned subsidiary of Hartford Hospital, operating under one license, as it appears was always the aim of the parties.

On November 9, 1993, Brian Clemow, Esquire (who was representing both Hartford Hospital and IOL at the time), reversed the position taken at the September 16, 1993 meeting and informed Fortier during a telephone conversation that Hartford Hospital was not going to recognize the Union after the merger and would not be a party to a successor collective-bargaining agreement. By letter dated November 19, 1993, Clemow reduced to writing the substance of the November 9 telephone conversation. Clemow's letter explicitly stated that in the interest of ''operating efficiencies and effective delivery of services,'' all current employees of the IOL would become Hartford Hospital employees, subject to the terms and conditions of comparable positions at the Hospital. Although Clemow acknowledged the reversal from the earlier position expressed at the September 16 meeting, he noted that the Union had been advised during that meeting ''that it was still early in the process, that the situation could change, and that if it did, we would let you know immediately.''

On November 22, 1993, after being informed of the plan to have IOL bargaining unit employees become employees of Hartford Hospital, Fortier made a comprehensive request for information from the IOL concerning the proposed merger, which was supplied on or about December 9, 1993. On December 20, 1993, a similar information request was made by the Union to Respondent's President and CEO John Meehan, along with a request for a meeting to discuss the impact of the merger on the Union's membership. By letter dated December 30, 1993, Meehan responded that Respondent was under no legal obligation to provide information to the Union and that it would not meet with the Union until it ''represents a majority of Hartford Hospital employees in a unit appropriate for collective bargaining.''

By letter dated January 20, 1994, the Union requested the IOL to open negotiations for a successor agreement. Although this request was made earlier in time than usual, the Union was still under the impression that the merger between the IOL and Respondent was scheduled to take place on April 1, 1994. By letter dated January 27, 1994, the IOL declined the Union's request to meet and bargain, stating that historically the parties did not meet to bargain a successor contract until 30 to 60 days prior to the expiration date. The Union was also informed that the new target date for the merger of the IOL and Respondent was October 1, 1994.

Prior to the onset of formal negotiations between the Union and the IOL, the Union's president, Jerry Brown, and Respondent's president, John Meehan, met informally to see if there was any way to resolve the issue of successorship on the merger of the two facilities. Although the Union was advised it would receive a formal response from Meehan regarding the successorship issue, it was not until June 15, 1994, that Respondent, in essence, indicated it would not recognize the Union on merger with the IOL.

The Union and the IOL eventually met to negotiate a successor collective-bargaining agreement on a number of occasions between April 14 and June 27, 1994. Although economic issues were discussed during these sessions, the Union made it clear that its overriding concern was the proposed merger and its impact on the bargaining unit. Although the Union proposed certain successorship language, the IOL made it clear it would not agree to any clause binding anyone beyond October 1, 1994. Although the Union and IOL were for all intents and purposes at impasse over the successorship issue and correlative duration issue, it is undisputed that notwithstanding the contract expiration on June 14, 1994, the IOL continued to honor the terms of the contract until October 1, 1994, the effective date of the merger.

Thereafter, by letter dated September 15, 1994, the IOL withdrew all contract proposals on the table and directed all

communications by the Union concerning a new collective-bargaining agreement be directed to Respondent. Shortly after receipt of this letter, Fortier wrote to Respondent President Meehan seeking to meet with Respondent to discuss recognition of the Union as well as the terms and conditions to be applied to union members effective October 1, 1994. By letter dated October 6, 1994, Meehan reiterated Respondent's earlier position that it did not believe it feasible to have former IOL employees working with similarly situated employees of Respondent under different conditions of employment. The Respondent also indicated that the IOL bargaining unit was not an appropriate unit and, accordingly, declined to recognize the Union as the exclusive bargaining representative of the former IOL employees. The Union has had no further contact with Respondent since the receipt of the October 6 letter.

D. *The Manner in Which the IOL and Hartford Hospital Have Operated Since the Merger*

Subsequent to the October 1, 1994 merger, the IOL continued to exist in its corporate form as a wholly owned subsidiary of Respondent. The IOL maintains its own board of directors. In addition, the IOL retains ownership of the IOL real estate, including the land and buildings situated on the IOL campus. The IOL also retains exclusive control over its approximately $20 million endowment fund to be used exclusively by and for the IOL. The IOL has also retained its name as a magnet for fundraising efforts. According to Laurence Berger, vice president of operations and codirector of Respondent's mental health network and former CEO at the IOL, the merger of the IOL with Respondent envisioned that in-patient psychiatric care will be provided exclusively at the former IOL campus.

John Connor, a senior psychiatric technician at the IOL for approximately 21 years, and currently classified as a psychiatric aide under Respondent's job classifications, testified that he performs the same job responsibilities as an employee of Respondent as he did while an employee of IOL. Both prior and subsequent to October 1, 1994, Connor, as well as all other former bargaining unit employees, have, without change, been supervised by the identical supervisory staff.[1] Subsequent to October 1, 1994, all of the former IOL bargaining unit employees continued to work in the same jobs as they held before the merger, without change. At no time since October 1, 1994, have former IOL bargaining unit employees ever performed their jobs at the Hartford Hospital main campus.[2] Further, there is no evidence indicating that between October 1, 1994, and March 1, 1995 (the date the CB–2 unit was relocated to the IOL facility), any former employees from Hartford Hospital transferred to the IOL campus.[3]

Respondent asserts that all technical employees, regardless of specialty, are interchangeable. According to Dr. Harold Schwartz, Respondent's director of psychiatry and medical director of the mental health network, ''[t]here are no thresholds to cross, and it's only a matter of orientation and familiarity.'' On consolidation of the psychiatric services at the IOL facility, however, even those psychiatric aides (as they are now referred to) who perform identical work and possess identical skills remain segregated. In this regard, despite the relocation of the CB–2 unit from Hartford Hospital to the IOL campus, the CB–2 unit remains staffed with the same Hartford Hospital personnel who staffed that unit prior to its relocation. Thus, Respondent's assertion that there is no difference between the work being performed by, or the skill level of, the psychiatric aides from Hartford Hospital and the psychiatric aides from the IOL appears to be lacking in substance.[4] The testimony of Dr. Schwartz indicates that it is the custom and practice of Respondent to staff its departments with personnel from that particular medical discipline before looking elsewhere to fill staffing needs. Respondent asserts that the current work force of psychiatric aides is largely interchangeable in a functional sense and are available to cover for each other's work assignment, whether on an emergency, temporary, or even a long-term basis. There is no showing that this is any change from the situation that existed prior to merger. As noted elsewhere, however, there had been no interchange of work functions between former IOL psychiatric aides and CB–2 psychiatric aides. There is no showing that any former IOL psychiatric aides have been used to work in any other area of Hartford Hospital, nor have any nonpsychiatric aides been shown to have performed work in the psychiatric department housed on the IOL campus, post merger.

Prior to the merger and thereafter, Hartford Hospital has maintained job classifications identical or similar to other job classifications listed in the former IOL bargaining unit, such as LPN's, X-ray technicians, EEG technicians, laboratory technicians, and certified occupational therapy assistants. According to Respondent, the education, skills, training, and functions of the employees in each of these job classifications are essentially the same regardless of which department in Hartford Hospital employees in those job classifications work. Though this might be true, there remains a clear segregation of the formal IOL bargaining unit, much as envisioned in the MOU. The evidence also revealed that the psychiatric bargaining unit personnel have extensive training in dealing with mental health problems and patients that appears necessary and would make it unlikely that one not so

[1] In this regard, the identical management personnel who had previously participated in grievance processing prior to the merger continued to participate in grievance processing subsequent to the merger. On brief, Respondent attempts to minimize the supervisory status of the unit employees immediate supervisors. It does not contend, however, that these supervisors are not supervisors within the meaning of the Act. (See Tr. 356.)

[2] There is evidence indicating that James Nyez, an employee formerly employed at Hartford Hospital who transferred to CB–2 prior to March 1, 1995, did receive his psychiatric training at the IOL facility and was trained there for approximately 1 month in anticipation of the relocation of the entire CB–2 unit to the IOL campus effective on March 1, 1995.

[3] Apart from evidence indicating that since October 1, 1994, an X-ray technician and EEG technician from Hartford Hospital each provided temporary coverage for vacationing IOL employees employed in these respective job classifications, there were no other transfers, temporary, or otherwise, prior to the relocation of the CB–2 unit to the IOL facility.

[4] Although approximately 40 people in total relocated from CB–2 to the IOL facility effective March 1, 1995, of that number there are only 9 employees employed in job classifications covered by the former IOL Union's collective-bargaining agreement; 5 licensed practical nurses and 4 psychiatric aides.

trained could perform adequately in the psychiatric department.

With regard to other unchanged circumstances since the merger, none of the former IOL unit employees were required to reapply or reinterview for positions with Hartford Hospital effective October 1, 1994. Parking and dining facilities for former IOL employees remained unchanged. The process by which IOL patients were fed meals also remained unchanged. The care and treatment of patients did not change effective October 1, 1994. There were no new policy manuals modifying the psychiatric care, treatment, or procedures to be followed on the merger of the two institutions. In fact, the CB–2 staff who were to be relocating to the IOL campus were trained by IOL personnel using IOL policy and procedure manuals.

Certain aspects of the two former separate operations were functionally integrated. The IOL surrendered its license to operate a health care facility and now the Hartford Hospital and the IOL operate under a single license. The combined operation has a single, systemwide operating budget. At least two Hartford Hospital operations, the geriatric medicine's ambulatory clinic, and the early child care program have moved or plan to move from the Hartford Hospital campus to unused space on the IOL campus.

Certain administrative functions have been consolidated under the supervision of individual Hartford Hospital heads. The combined organization has single vice presidents for finance, human resources, management information systems, patient operations, clinical affairs, and planning and facilities management. Prior to the merger, the IOL had its own department heads in each of these areas. The individuals formerly responsible for these functions at the IOL have either left or now report to supervisors in the Hartford Hospital chain of command. The responsibilities of the former IOL managers who remain employed by the Hospital are not necessarily limited to operations on the former IOL campus and in many cases their responsibilities have been broadened to include other Hartford Hospital functions.

There is a single, unified system of patient admissions, with a single phone number and a single place where decisions about physical placement and program placement are made. Patients and medical records move freely throughout the system as treatment dictates, without restriction.

In terms of physical integration within the Hospital's mental health system, certain psychiatric programs, and services that existed at Hartford Hospital prior to the merger have been extended to service patients housed on the former IOL campus. These include emergency room services, emergency psychiatry services for patients with both medical and psychiatric treatment needs, and project recovery, a program for substance-abusing women of child-bearing age. All of these programs and services continue to be housed on the main Hartford Hospital campus. IOL's outpatient department was relocated and consolidated on the main campus of Hartford Hospital.

There has also been a centralization of the purchasing functions of both IOL and Hartford Hospital, supplies of both (with the exception of food and supplies used exclusively in psychiatric treatment), laundry services, security, pharmacy services, printing services, mail services, and telephone services.

Because the combination of Hartford Hospital and IOL became fully effective on October 1, 1994, all employees both at the main Hartford Hospital campus and the former IOL campus have worked under common personnel policies and procedures, which were distributed in written form to all former IOL employees. Common control over employee relations matters, both for former IOL employees and other Hartford Hospital personnel, is maintained through a single personnel office, which is located on the main Hartford Hospital campus.

Personnel and attendance records are now centrally maintained at Hartford Hospital's personnel office for all employees, regardless of their worksite. Performance evaluations are handled through the Hospital's personnel office for all Hartford Hospital employees, including former IOL employees, using the same system and the same Hartford Hospital forms. Decisions about employee discipline or discharge are handled through the Hospital's central personnel office for all employees, including former IOL personnel. Human resource personnel are generally involved in disciplinary decisions, depending on the severity of the particular action being taken, and must specifically approve any discharges.

Since October 1, 1994, the Hospital has maintained a single, unified system for the hiring of new employees, which is centralized at the personnel office on the main Hospital campus. Regardless of the location at which they may ultimately work, job candidates must undergo an initial screening interview by human resources personnel at the central personnel office. If they pass their screening interview, candidates are then interviewed ''on site'' at the locations to which they will be assigned by the persons who will be their immediate supervisors. Actual job offers are made through the Hospital's central personnel office, regardless of where the job will be performed. Two psychiatric aides whose worksite is in the Donnelly building on the former IOL campus have been hired through the personnel office on the main Hartford Hospital campus since October 1, 1994. These two employees were assigned to the former CB–2 unit relocated to the Donnelly building on March 1, 1995.

All Hartford Hospital job openings are posted systemwide, regardless of the campus on which the job is located. There are no restrictions on job transfers between campuses. All persons employed in the five in-patient psychiatric units at Hartford Hospital, both the former CB–2 unit as well as the four former IOL units, are under a single unified supervisory structure. There does not appear to be any change in the supervision of the former IOL bargaining unit members, except that Dr. Schwartz has replaced the former CEO of the IOL as the person in charge of the psychiatric department and the Hospital's director of nursing is different.

Common job classifications have been applied to all former IOL employees and other Hartford Hospital personnel. Former IOL job titles have been changed as necessary to conform to the corresponding Hartford Hospital job classification. Since October 1, unspecified joint orientation sessions for employees in the mental health area at both the main Hartford Hospital campus and the former IOL campus have engaged in joint orientation sessions with each other.

E. *Unilateral Changes in Working Conditions*

Subsequent to the merger, Hartford Hospital has instituted a number of unilateral changes in the wages, benefits, and

working conditions of the former IOL bargaining unit members. These changes include the elimination of short-term disability insurance, changes in the manner in which overtime pay is calculated, minor variations in health insurance coverage (essentially focusing on the insurance carrier), elimination of wage increases, institution of lump sum bonus payments, changes in pension plan provisions, changes affecting seniority rights, changes to the supplemental life insurance benefits, changes with regard to the calculation of shift differential premium pay for vacation and sick leave purposes, changes impacting on personal paid time off policies, changes in the manner in which personal days are accrued, elimination of Martin Luther King Day as an optional holiday, and the elimination of dues-checkoff and binding arbitration.

All employees of Hartford Hospital, including those formerly employed by IOL, work under a common wage and benefit structure. With the exception noted below, employees occupying the same job classifications receive the same wages and benefits, regardless of where they work at Hartford Hospital. All employees are covered by the same group health insurance plan, and former IOL employees who are members of the IOL pension plan have become members of the Hartford Hospital pension plan. The exception to this uniformity is with respect to former IOL employees who were earning wage rates outside the rate ranges for their Hartford Hospital counterparts at the time of the merger. Those employees, including the more experienced psychiatric aides, who were earning more than the maximum Hartford Hospital rates were ''red circled'' rather than be reduced in pay. Those former IOL employees who were earning less than their Hartford Hospital counterparts were given increases to bring them within corresponding Hartford Hospital rate ranges.

F. *Conclusions with Respect to the Legal Issues*

1. Respondent is obligated to recognize and bargain with the Union if the unit remains appropriate

The General Counsel asserts that there is no question that if the former IOL bargaining unit continues to remain an appropriate unit following the merger, Respondent would be required to recognize and bargain with the Union as the representative of that unit because either (1) the merger is nothing more than a corporate consolidation akin to a stock transfer, as in *Children's Hospital of San Francisco*, 312 NLRB 920, 926–928 (1993); or (2) Respondent is a successor employer to the IOL within the meaning of *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987).[5] I believe that the former analysis most nearly fits the facts of this case, though a successorship analysis would also be appropriate.

In *Children's Hospital*, supra, a case that poses facts strikingly similar to the instant case, a merger occurred between Children's Hospital and Pacific Presbyterian Hospital, two previously separate hospitals located about 1 mile apart. Following the merger, a new entity called the California Pacific Medical Center was created, with the former Children's Hospital thereafter known as the California campus, and the former Pacific Presbyterian Hospital known as the Pacific campus. The approximately 600 registered nurses (RNs) at Children's Hospital had for many years been represented by the California Nurses Association (CNA); the approximately 840 RNs at Pacific Presbyterian Hospital had never been represented by any labor organization. Following the merger, the respondent therein (the new entity) refused to recognize the CNA as the representative of the former Children's Hospital RNs because the number of RNs at Pacific Presbyterian outnumbered the RNs at Children's Hospital. Moreover, each hospital continued to operate as a full service, acute care medical facility, but with centralized management; common personnel and labor relations functions, including hiring; common wages, benefits, policies, and rules; common job postings and training; and some sharing of equipment. In addition, the two formerly separate hospitals held themselves out to the public as a single entity.

In the instant case, the IOL became a wholly owned subsidiary of Hartford Hospital, with the aim of combining the Hospital's mental health services with those provided by the former IOL. The letter of intent between the parties provides, inter alia, that the ''guiding organizational principles are to be those expressed in the MOU, namely, the preservation and enhancement of IOL's identity, mission and special focus.'' In keeping with this directive, the former IOL bargaining unit continued to provide the same services in the same facilities and with the same immediate supervision as it had prior to the October 1, 1994 merger. The much smaller mental health staff of Hartford Hospital was moved to the IOL campus and housed in the same building with the former IOL staff in March 1995. As of the date of hearing, the Hartford Hospital mental health staff had little if any interaction with the former IOL staff, at least at the bargaining unit level.

As was the case in Children's Hospital, I believe that this merger was in fact more akin to a stock transfer with Hartford Hospital being the surviving entity. With respect to the continuing obligation to bargain with the union representing the subsidiary's employees, the essential inquiry is whether operations, as they impinged on bargaining unit members, remained essentially the same after the transfer of ownership. *Phil Wall & Sons Distributing*, 287 NLRB 1161 fn. 1, 1165 (1988). Herein, as in a true stock transfer situation, there was no hiatus in operations and the daily operation of the former IOL continued as before. The unrebutted testimony of John Connor established that his job did not change before or after October 1, 1994. Connor continues to perform his job responsibilities in the identical manner as he did before October 1, 1994. He continues to report to the same supervisors to whom he reported prior to October 1, 1994. In all respects his work remains unchanged since October 1, 1994, including the employees with whom he associates in performing such work. Such changes as have occurred post merger pri-

[5] Similarly, the unilateral changes would violate Sec. 8(a)(5) of the Act under either approach. See *NLRB v. Katz*, 369 U.S. 736 (1962) (unilateral changes in terms and conditions of employment concerning matters that are mandatory subjects of bargaining over which a union seeks to bargain violate Sec. 8(a)(5) of the Act). If it is a merger, the Hospital would have been prohibited from changing any terms and conditions of employment without bargaining. As a *Burns* successor, under ''perfectly clear'' exception, the Hospital was not free to make any changes in the terms and conditions of employment of the IOL employees. *Spruce-Up Corp.*, 209 NLRB 194, 195 (1974).

marily have to do with achieving economies of scale by eliminating duplicating functions such as financial and administrative services, patient admissions, and other services detailed above in my fact findings. These changes have had little impact on the day-to-day working conditions of the involved bargaining unit personnel.

As stated by the administrative law judge in *Children's Hospital*, supra at 927:

> The significance of the above conclusion to the issues herein is clear. Thus, the Board has long held ''that the 'mere change of stock ownership does not absolve a continuing corporation of responsibility under the Act.''' *Rockwood Energy Corp.*, supra; *Miller Trucking Services*, 176 NLRB 556 (1969). In particular, when a stock transfer occurs and the entity's employees are represented by a labor organization, the new owner ''may not decline to recognize and bargain with the [said labor organization] in the appropriate unit.'' . . . if the stock transfer occurs after the expiration of a collective-bargaining agreement, the new owner is obligated to continue to recognize and bargain with the labor organization in an appropriate unit and to ''maintain the terms and conditions of employment [the entity] established . . . without unilateral change after the agreement expired.'' *Rockwood Energy Corp.*, supra; *Phil Wall & Sons*, supra; *Hendricks-Miller Typographic Co.*, supra . . . *Western Boot & Shoe*, 205 NLRB 999 (1973).

Respondent admits that the IOL continues to be an ongoing not-for-profit corporation, which retains full ownership of its real property and the building situated thereon. It also retains sole control over its $20 million endowment fund that is for the exclusive use of the IOL. In *Children's Hospital*, supra, at 927–928, citing *Food & Commercial Workers v. NLRB*, 768 F.2d 587, 589 (6th Cir. 1982), the administrative law judge therein noted:

> [W]hile insisting that a new entity resulted from the merger of the two hospitals, Respondent excused and rationalized the retention of the Children's Hospital corporate structure as being necessary to take advantage of the latter's pre-existing tax exempt status as a charitable institution; however, it is clear that an employer may not justify gaining tax advantages by asserting its continued viability while, at the same time, denying its continued existence in order to evade its obligations to employees under the Act.

For the foregoing reasons, I find and conclude that the Respondent had an obligation to recognize and bargain with the Union with respect to the involved unit, if that unit is an appropriate one within the meaning of the Act.

With respect to the question of whether Hartford Hospital is a successor to the IOL, the Supreme Court in *NLRB v. Burns Security Services*, supra, held that a new employer's duty to bargain with the union arose when it selected as its work force the employees of the previous employer to perform the same tasks at the same place they worked before. As the Court stated at 279:

> It has been consistently held that a mere change of employers or [a mere change in] ownership in the employing industry is not such an ''unusual circumstance'' as to affect the force of the Board's certification within the normal operative period if a majority of employees after the change in ownership or management were employed by the preceding employer.

In *Fall River Dyeing Corp.*, supra, the Supreme Court noted that ''[i]f the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, the bargaining obligation under § 8(a)(5) is activated.'' (482 U.S. at 41.) In determining whether an employer has generally maintained the same business, the Court in *Fall River Dyeing* focused on whether there is ''substantial continuity'' between the new and the prior enterprises, noting the following factors:

> [W]hether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production processes, produces the same products, and basically has the same body of customers. [Id. at 2437, citations omitted.]

The evidence in the instant case reflects that Hartford Hospital has continued to operate, from the former IOL bargaining unit employees' point of view, the same business in the same location under the same working conditions, and under the same immediate supervision as was the case with the IOL. The IOL is akin in my opinion to a subsidiary corporation of a larger corporation or a division of a corporation, providing a product different from the other parts of the Company. In this status, the business of the IOL continues in all essential ways to be the same as before the merger. In these circumstances, and as the overwhelming number of employees within the unit are former IOL bargaining unit members, I find that Hartford Hospital has a legal obligation to recognize and bargain with the Union as a successor to the IOL, again assuming the unit remains an appropriate one.[6]

2. Does the involved unit continue to be an appropriate one?

Section 9(a) of the Act provides in relevant part that:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive [bargaining] representative of all the employees in such unit for the purposes of collective bargain-

[6] Respondent attacks the General Counsel's assertion of a successorship theory here, inter alia, because it is contrary to the position taken by the General Counsel in the case of *Pathology Institute*, Case 32–CA–12599–1 (August 31, 1994). As noted by the administrative law judge in his decision, however, the General Counsel in that case did not make a successorship allegation because the therein involved unit was not a unit defined in the Board's Rules and it could not be considered an ''existing non-conforming unit.'' That is not the situation in the instant case.

ing in respect to rates of pay, wages, hours of employment, or other conditions of employment.

Neither the Board nor courts considering this issue require that the unit be the most appropriate bargaining unit. Rather, all that is required is that the unit be an appropriate bargaining unit. *American Hospital Assn. v. NLRB*, 499 U.S. 606, 610 (1991); *Staten Island University Hospital v. NLRB*, 24 F.3d 450 (2d Cir. 1994). This determination, in turn, depends on the degree to which employees in one location share a community of interest distinct from the interests of employees employed by an employer at other locations. In circumstances such as are present here, a single facility unit geographically separate and distinct from Respondent's main facility is appropriate because of the unique community of interest shared among the psychiatric technicians (and other bargaining unit personnel) formerly employed by the IOL. *Staten Island University Hospital v. NLRB*, supra; *Manor Healthcare Corp.*, 285 NLRB 224 (1987).

In *Manor Healthcare Corp.*, supra, the Board extended the single facility presumption to the health care industry, the presumption being a rebuttable one requiring the party opposing such a unit to do so ''by a showing of circumstances that militates against its appropriateness, including an increased risk of work disruption or other adverse consequences.'' Id. The Board also indicated that it would continue to weigh the ''traditional factors'' normally utilized in unit determination case, to determine if the presumption had been overcome. These factors include: (1) geographic proximity of the bargaining unit's members; (2) members' function and skill similarity; (3) similarity of members' employment conditions; (4) administrative centralization; (5) managerial and supervisory control of the unit's members; (6) employee interchange; (7) functional integration of the employer; and (8) bargaining history of the unit's members. *Staten Island University Hospital*, supra. As found by the Chief Judge Dorsey in the companion 10(j) proceeding, ''Most, if not all, of those factors suggest the union is an appropriate unit.'' For the reasons set forth below, I do not believe the presumption has been rebutted by the Respondent and the former IOL bargaining unit remains an appropriate one.

Giving a more detailed examination to the ''traditional factors'' in unit determination supports the General Counsel's position that the former IOL bargaining unit retains a community of interest and continues to be an appropriate unit. With respect to the first of these eight factors, geographic proximity, I note that the court in *Staten Island University Hospital* held at 24 F.3d 450 (1994), ''The geographic proximity factor neither compels nor precludes the NLRB's decision.'' It further found that this factor offers little guidance on the appropriateness of a bargaining unit. The former IOL bargaining unit is housed in the Donnelly building on the southern portion of the former IOL campus, which is across a street from the Hospital's main campus. Though the distance is not great, it is the same distance that always existed before the merger. As will be noted in discussion of the other factors, the former IOL bargaining unit is and remains physically and functionally segregated from the other employees of Hartford Hospital. This segregation appears to me to accomplish separation of the two groups of employees as successfully as would a more extensive geographic separation. Certainly, when one looks at the other factors involved in this determination, the purpose behind need for geographic separation is met in this case.

With respect to the matter of members' function and skill similarity, the actions of Respondent lend support to the continued appropriateness of the former IOL bargaining unit. I believe this factor must be viewed together with the factors of employee interchange and the functional integration of the employer. When these factors are viewed together, it is clear that the former IOL unit enjoys a community of interest within itself and its skills and functions are different from other Hartford Hospital employees.

Respondent attempted to demonstrate that the community of interest of former IOL technical employees is now so intertwined with that of the Hartford Hospital technical employees that the former IOL bargaining unit can no longer be deemed appropriate. The unrebutted testimony of John Connor as well as the testimony of Respondent's own witnesses belies any such claim. In fact, it appears that the merger of the IOL and Hartford Hospital and subsequent relocation of the psychiatric services formerly performed at CB–2 have only served to further segregate and isolate the psychiatric employees from the rest of Respondent's employee population. Moreover, apart from the relocation of the ''technical'' employees (nine in total) from CB–2 to the IOL facility, there has been no interchange or interaction between any technical employees employed at Respondent's main facility with the technical employees employed at the IOL facility.[7] (Tr. 351, 357.) In fact, despite the alleged integration of all psychiatric services to the IOL facility effective March 1, 1995, as of the hearing they too continue to be segregated to the units they formally worked on prior to the October 1, 1994 merger. Testimony regarding the relative ease by which a psychiatric technical employee could skillfully perform his/her job duties in other departments at Respondent's facility, and vice versa, is pure speculation, certainly in light of the fact that no such transfers have occurred since October 1, 1994. Such evidence, or the lack thereof, only strengthens the argument that the IOL bargaining unit remains appropriate and distinct.

Although Respondent asserts that the community of interest enjoyed by the former IOL employees has been destroyed since October 1, 1994, the evidence adduced here indicates that just the opposite is true. In this regard the generalized testimony proffered by Respondent's witnesses that nothing prevents it from completely intermingling the former IOL psychiatric technical employees with Hartford Hospital's technical employees is not credible. In practice that would not occur, as it has not occurred, because the very nature of psychiatric services compels its segregation from other medical services. In *Brattleboro Retreat*, 310 NLRB 615, 616 (1993), the Board, citing 53 Fed.Reg. 33930, and *Park Manor*, 284 NLRB 1515, 1570 (1984), noted that ''psychiatric hospitals differ from other acute care hospitals in that therapeutic programs are highly integrated, there are more paraprofessionals (mental health workers), and all em-

[7] Although Respondent notes that IOL bargaining unit employees have jointly participated with other nonunit employees of Respondent in orientation and in-service training conducted at Respondent's main campus, such interaction will not overcome the presumption that the IOL bargaining unit remains appropriate. *Staten Island University Hospital*, supra.

ployees are specially trained in relating to patients as all employees' actions have an impact on patient care. Thus, Respondent's plan could not possibly contemplate an intermingling of all of its technical employees on a hospitalwide basis. Certainly such an intermingling was not the vision of the Hospital as set forth in the MOU. More significantly, since the merger Respondent has further isolated and segregated all psychiatric services it offers by consolidating and performing them solely at the IOL facility, or the two off campus locations of the IOL. Thus, Respondent's actions in the actual operation of its facilities certainly speaks far louder than its proffered words at the hearing. Accordingly, the evidentiary record clearly supports the General Counsel's assertion that the unique character and appropriateness of the IOL bargaining unit has not only been preserved since the merger, but has actually been strengthened as well. The functional integration of IOL and Hartford Hospital seems to me to be primarily in the area of shared administrative and support services, and not in core functions performed by the IOL bargaining unit.

With respect to the factor of similarity of members' employment conditions, I would note that from a day-to-day view, the former IOL unit members working conditions have not changed and to the extent that their wages, benefits, and working conditions have been made similar to the other Hartford Hospital employees, this has been the result of the Hospital's unilateral changes that are complained of here. As noted by the Board in *Empire Health Centers Group*, 314 NLRB 1 (1994), the fact that the IOL and Hospital employees share the same wage and benefit structure after the merger ''begs the question.'' In *Empire Health*, the Board explicitly rejected the argument that the combined work force of two merged facilities was the only appropriate bargain unit based on shared terms and conditions of employment since, as in the instant case, the two groups shared the same wage and benefit structure only because the employer refused to bargain with the union representative of one group and unilaterally imposed on those employees a new wage and benefit structure.[8]

With respect to the factors of administrative centralization and managerial and supervisory control of the unit's members, the facts reflect there was a good deal of administrative centralization and some top level changes in management. The same was true in both *Children's Hospital* and *Staten Island University Hospital* as well. The court in *Staten Island University Hospital* noted that while administrative centralization favors an employerwide unit, site-specific supervision, such as remains with the IOL unit, favors separate units. As noted earlier, the immediate supervision of the IOL bargaining unit members stayed the same after the merger.

The last of the eight factors, bargaining history of the unit's members, lends great weight to the continuing appropriateness of the former IOL bargaining unit. In *Children's Hospital*, in adopting the administrative law judge's decision in which he found that the respondent therein was obligated to recognize and bargain with the CNA as the representative of the RNs at the former Children's Hospital, the Board specifically agreed with the judge's primary reliance on the ''long bargaining history'' between the Children's Hospital and the CNA, stating:

> That long term relationship was reasonably relied on by the judge in finding that—where the proffered unit choices are a unit consisting of the facility in which the bargaining relationship had existed and a unit encompassing that facility and another which lacked a similar bargaining history—the single facility is an appropriate unit. [Id. at 920.]

Moreover, the Board noted that even without relying on the bargaining history, it would affirm the judge's decision because of its agreement with the judge that other factors warranted the finding on an appropriate unit, including the lack of significant interchange between the nurses on the two campuses, and ''the absence of record evidence of any potential for adverse consequences resulting from a labor dispute in this unit.'' Id.

Even assuming arguendo, however, that the IOL and Hartford Hospital now constitute a single facility for the purposes of applying the ''single employer presumption,'' the Union has overcome the presumption that the only appropriate unit would consist of all technical employees from both the IOL and Hartford Hospital. In this regard, and for the reasons given above, the evidence establishes that the IOL employees continue to constitute an appropriate unit following the merger. Moreover, there are no Board or court cases that would preclude a labor organization from rebutting an employer's claim that only a single facility bargaining unit is appropriate by establishing the appropriateness of some smaller unit within the single facility, especially when that unit is an existing one with a long collective-bargaining history. *Manor Healthcare Corp.*, 285 NLRB 224, 227 (1987) (''parties have the opportunity to present any evidence that reasonably tends to show the single facility to be inappropriate, and the Board must consider the unique circumstances of a particular group of employees before reaching a final determination'').

As in *Children's Hospital*, the instant case reveals a long and well established bargaining history between the IOL and the Union, coupled with the postmerger lack of employee interchange, lack of common immediate supervision, and the absence of evidence of any potential for undue adverse consequences resulting from a labor dispute in the IOL unit. Despite the foregoing, Respondent contends that the IOL and Hartford Hospital must be considered a ''single facility'' because of their geographic proximity and functional integration, and that if it is a single facility, the Board's ''single facility presumption'' as set forth in *Brattleboro Retreat*, supra, precludes a finding that the IOL employees constitute a separate appropriate unit following the merger. In this regard, counsel for the General Counsel asserts that the evidence adduced herein, including the continuing existence of the IOL as a corporate entity, the continuing existence of the IOL endowment fund and charitable solicitations in the name of the IOL, the July 9, 1993 MOU and the April 29, 1994 agreed settlement indicates that the IOL continues to exist as a separate entity following the merger. I agree with this

[8] Although Respondent asserts that as a result of its merger with IOL a great deal of functional and operational integration has occurred, including the uniform application of benefits, personnel policies, and procedures as well as attempts at wage equalization, these similarities have occurred only because Respondent refused to recognize and bargain with the Union before unilaterally imposing terms and conditions of employment upon the IOL bargaining unit. See *Empire Health Centers Group*, supra.

view. Whether one views it as a subsidiary corporation or a corporate division, it does continue to have a separate identity from the rest of Hartford Hospital, an identity separate physically, by function, and by the skills of its unit employees. Equally significant is the lack of any evidence that a labor dispute at the IOL would have a significant impact on the delivery of services by Hartford Hospital at its main facility. Such evidence seriously undercuts Respondent's assertion that the IOL and the Hospital now constitute a single full-service acute care facility. To the contrary, the evidence indicates that after the merger Respondent continues to operate a full-service acute care hospital, with the IOL, as a subsidiary or division, continuing to operate a psychiatric hospital incorporating the former psychiatric services of the Hartford Hospital, and the two entities are commonly administered and governed. Such a relationship is far more akin to the relationship between the two hospitals described in *Children's Hospital*, supra, than to the relationship between the entities in *Brattleboro Retreat*, supra.

Although the Respondent argues that the Second Circuit opinion in *Staten Island University Hospital v. NLRB*, supra, and the Board's decision in *Children's Hospital*, supra, are not dispositive of the issues pending here, these cases are the latest pronouncements by the Second Circuit and the Board, respectively, regarding the continued appropriateness of a single facility unit under circumstances similar to those existing here. Of critical importance to the Board and the court in finding that these single facility units remained appropriate after a merger was the long term, continuous bargaining history the single facility enjoyed prior to the merger. In both *Staten Island University Hospital* and *Children's Hospital*, as in the instant case, there was a great deal of functional integration and administrative centralization following the merger. Notwithstanding the ''top down'' merger undertaken in those cases, the day-to-day activities of the employees at the respective institutions, as in the instant case, remained essentially unchanged.

Moreover, despite Respondent's incorrect claim of complete functional and administrative integration, Respondent admits that the IOL continues to be an ongoing not-for-profit corporation, which retains full ownership of its real property and the building situated thereon. It also retains sole control over its $20 million endowment fund, which is for the exclusive use of the IOL.

Respondent also asserts that the decisions in *NLRB v. Catherine McCauley Health Center*, 885 F.2d 341 (6th Cir. 1989), and *Brattleboro Retreat*, supra, are dispositive of the issues involved in this proceeding. Again, this is not correct. Respondent relies on these cases largely for the proposition that given the geographic proximity between IOL and Respondent's main facility, the institutions should be treated as a single facility. Certainly, the geographic proximity between these two facilities is not great, but it also has not narrowed since the merger. Nor would Respondent claim that prior to October 1, 1994, IOL and Respondent were not indeed separate and distinct facilities. In these circumstances, geographic proximity offers little guidance on the continued appropriateness of the IOL bargaining unit. *Staten Island University Hospital v. NLRB*, supra. In *Catherine McCauley Health Center*, supra, unlike the instant case, there was a great deal of employee interchange with approximately 50 percent of the former bargaining unit employees having been transferred away from the involved facility. In my opinion, this is a serious distinction because it negates any notion of separateness that would support a finding of community of interest. On the other hand, I believe that the virtual absence of employee interchange in the instant case strongly enhances the extent of physical separation of the IOL from the main Hartford Hospital.

Factually, *Brattleboro Retreat*, supra, is also distinguishable from the circumstances existing herein. In *Brattleboro*, the unit that the petitioning labor organization sought to represent included technical employees employed at a psychiatric facility (Rockwell Center), a nursing home (Linden Lodge), and the Resource and Development Corp., which held assets including a country club, a farm, and staff housing facilities wherein some of the petitioned-for unit employees were employed. Moreover, the functional integration of the petitioned-for unit had occurred well before the petition to represent the employees had been filed. Perhaps the most critical distinction in *Brattleboro* was the lack of any prior bargaining history at any time before the representation petition was filed. I believe that bargaining history is the single most important factor relied on by the Board in finding that a preexisting single facility bargaining unit remains appropriate subsequent to a merger.

Moreover, any reliance on the Sixth Circuit decision in *NLRB v. Catherine McCauley Health Center*, supra, at this time is questionable. That decision has never been relied on by the Board or any court outside the Sixth Circuit since its publication and it is certainly inapplicable where Second Circuit decisions have provided persuasive if not binding precedent. See, e.g., *Staten Island University Hospital v. NLRB*, supra; *Hotel, Hospital, Nursing Home & Allied Services Employees Local 144 v. NLRB*, 9 F.3d 218 (2d Cir. 1993). Moreover, *NLRB v. Catherine McCauley Health Center*, supra, was decided before the Board's health care unit rules were established, and to the extent it relies on the Second Circuit's opinion in *Long Island-Jewish-Hillside Medical Center v. NLRB*, 685 F.2d 29, 34 (2d Cir. 1982), which held that the ''single-facility presumption is inapplicable in the health care context,'' it was overruled in *American Hospital Assn. v. NLRB*, supra, and *Hotel, Hospital, Nursing Home & Allied Services Employees Local 144 v. NLRB*, supra. Thus, the viability of the *Catherine McCauley* decision is questionable. It should also be noted that the underlying Board decision in *Catherine McCauley Health Center*, 287 NLRB 1114 (1988), found a violation of the Act for the employer's refusal to recognize and bargain with the union that had represented a service and maintenance unit at the employer's separate facility for less than 1 year.

With regard to any claim by Respondent that the instant matter raises a novel application of the Board's health care bargaining unit rules, Respondent correctly cites *American Hospital Assn. v. NLRB*, supra, as upholding those rules. Although noting that the Board specified only eight specific bargaining units, with three exceptions, Respondent incorrectly asserts that none of the exceptions are applicable to the instant proceeding. To the contrary, in one of the exceptions the Board, with Supreme Court approval, found appropriate preexisting nonconforming units. As the legal successor of the IOL, Respondent stands in the IOL's shoes with regard to the application of the health care unit rules. Thus, if the unit rules are applied to the combined Respondent-IOL be-

cause of its status as an acute care hospital, as contended by Respondent, the exception for preexisting nonconforming units mandates the continuing viability of the IOL unit as an appropriate unit following the merger. See *Kaiser Foundation Hospitals*, 312 NLRB 933 (1993), wherein the Board held at 935:

> Finally, the Board's long-standing policy of according great deference to collective-bargaining history also supports our decision not to apply the Rule automatically to preexisting nonconforming units. We conclude that this result is consistent with the design and purpose of our decision to engage in rulemaking—and to further the long-standing policy of promoting industrial and labor stability—and does not conflict with the Congress' admonition against undue proliferation of bargaining units in the health care industry.

On the other hand, if the unit rules are applied to a separate Respondent-owned IOL, the exception for psychiatric institutions would preclude the application of the unit rules and establish beyond any question that the IOL unit continues to exist as an appropriate unit following the merger. Either way, the unit survives and continued recognition and bargaining is clearly warranted.

As I find that the involved bargaining unit continues to be an appropriate one within the meaning of Section 9(a) of the Act, and as I have heretofore found that Respondent has an obligation to bargain with the Union if the involved unit continues to be appropriate, I find that the Respondent's refusal to recognize the Union as the exclusive collective-bargaining representative of its employees in the unit violates Section 8(a)(1) and (5) of the Act. I further find that its unilateral changes in the wages, benefits, and working conditions of the unit employees, as set forth in the expired collective-bargaining agreement between the IOL and the Union, also violates Section 8(a)(1) and (5) of the Act. *NLRB v. Katz*, 369 U.S. 736 (1962); *Spruce-Up Corp.*, 209 NLRB 194, 195 (1974).

CONCLUSIONS OF LAW

1. Hartford Hospital is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and is a health care institution within the meaning of Section 2(14) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Since March 1981, the Union has been the certified exclusive bargaining representative of the employees in the following unit found appropriate within the meaning of Section 9(a) of the Act:

> All full-time and regular part-time technical employees, including LPN's, psychiatric technicians, residential counselors, rehabilitation liaison instructors, rehabilitation instructors, COTA's, EEG technicians, X-Ray technicians, and dental technicians employed at the IOL facility, but excluding unit coordinators, rehabilitation coordinators, electronics technician, audio-visual technician, dietary technician, all service and maintenance employees, clerical employees and guards, professional employees and supervisors as defined in the Act.

4. Since October 1, 1994, Respondent has engaged in conduct in violation of Section 8(a)(1) and (5) of the Act by:

(a) Failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of its employees in the above-described unit.

(b) Unilaterally changing the terms and conditions of employment of its employees in the above-described unit without affording the Union notice and the opportunity to bargain in good faith.

5. The foregoing unfair labor practices committed by Respondent are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in conduct in violation of Section 8(a)(1) and (5) of the Act, it is ordered to cease and desist therefrom, and to take the following affirmative action deemed necessary to effectuate the policies of the Act.

Respondent is ordered to recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of its employees in the unit found here to be appropriate. It is further ordered, on request of the Union, to rescind all unilateral changes it has made since October 1, 1994, in the wages, hours of service, benefits, and working conditions of its employees in the involved bargaining unit and to restore the status quo ante. It is not entirely clear from the record evidence whether any of the unilateral changes the Respondent unlawfully imposed on the bargaining unit employees adversely affected them. In the event it is shown subsequently at the compliance stage that the involved employees have lost wages or benefits as a result of those changes, Respondent should be ordered to make these employees whole for such losses. In this regard, backpay should be computed in accordance with the Board's formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in the matter set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Hartford Hospital, Hartford, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of its employees in the following unit:

> All full-time and regular part-time technical employees, including LPN's, psychiatric technicians, residential counselors, rehabilitation liaison instructors, rehabilitation instructors, COTA's, EEG technicians, X-Ray technicians, and dental technicians employed at the IOL facility, but excluding unit coordinators, rehabilitation coordinators, electronics technician, audio-visual techni-

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

cian, dietary technician, all service and maintenance employees, clerical employees and guards, professional employees and supervisors as defined in the Act.

(b) Unilaterally changing the terms and conditions of employment of its employees in the above-described unit without affording the Union notice and the opportunity to bargain in good faith.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Extend recognition to the Union as the exclusive collective-bargaining representative of its employees in the above-described unit.

(b) On request of the Union, rescind the unilateral changes it instituted on and after October 1, 1994, in the wages, benefits, hours of work, and other working conditions of its employees in the above-described unit, and restore the wages, hours of work, and other working conditions as set forth in the collective-bargaining agreement between the Union and the IOL that expired on June 14, 1994.

(c) In the event it is subsequently shown that any employees affected by the unlawful unilateral changes made by Respondent on and after October 1, 1994, have suffered loss of wages or benefits, Respondent is ordered to make such employees whole, with interest, in the manner set forth in the remedy section of this decision.

(d) Preserve, and on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at the Respondent's Hartford, Connecticut facilities copies of the attached notice marked ''Appendix.''[10] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to the Respondent's are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to bargain with New England Health Care Employees Union, District 1199, AFL–CIO as the exclusive collective-bargaining representative of our employees in the following unit:

All full-time and regular part-time technical employees, including LPN's, psychiatric technicians, residential counselors, rehabilitation liaison instructors, rehabilitation instructors, COTA's, EEG technicians, X-Ray technicians, and dental technicians employed at the IOL facility, but excluding unit coordinators, rehabilitation coordinators, electronics technician, audio-visual technician, dietary technician, all service and maintenance employees, clerical employees and guards, professional employees and supervisors as defined in the Act.

WE WILL NOT unilaterally change the terms and conditions of employment of our employees in thethe above-described unit without affording the Union notice and the opportunity to bargain in good faith over such changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL extend recognition to the Union as the exclusive collective-bargaining representative of our employees in the above-described unit.

WE WILL, on request of the Union, rescind the unilateral changes we instituted on and after October 1, 1994, in the wages, benefits, hours of work, and other working conditions of our employees in the above-described unit, and restore the wages, hours of work, and other working conditions as set forth in the collective-bargaining agreement between the Union and the Institute of Living that expired on June 14, 1994.

WE WILL, in the event it is subsequently shown that any employees affected by the unlawful unilateral changes made by the Employer on and after October 1, 1994, have suffered loss of wages or benefits, make such employees whole, with interest.

HARTFORD HOSPITAL